



Nyaga v Xtranet Communications Limited (Employment and Labour Relations Cause 1597 of 2018) [2024] KEELRC 359 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 359 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1597 OF 2018
AN MWAURE, J
FEBRUARY 23, 2024**

BETWEEN

LOYFORD MWITI NYAGA CLAIMANT

AND

XTRANET COMMUNICATIONS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 6th December 2018.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a Software Marketer on 04.09.2017.
3. The Claimant avers that the letter of employment provided he would be on probation for the first 3 months for performance observation. After 6 months, the Claimant requested for a remuneration review and confirmation of his employment. Subsequently, he received several letters setting out performance targets which deferred the confirmation of employment on grounds that the performance targets were not reached.
4. The Claimant avers that the Respondent sent an email on 12.10.2018 attaching a letter terminating the Claimant's employment on grounds of 'unsatisfactory job performance and no visibility of performance improvement on sales achievement.'
5. The Claimant avers that the Respondent immediately thereafter removed his access credentials from its information technology systems and the Claimant was denied access to carry out his duties. The Respondent also demanded that the Claimant returns all its property assigned to him.
6. The Claimant avers that he replied to the dismissal letter vide a letter dated 25.10.2018 in which he refuted the content with regards to performance and targets therein and he also demanded his accrued commissions and unpaid salary and leave days.



7. The Claimant avers that the Respondent responded via an email to his personal email alleging he absconded from duty knowing well that it had removed his access credentials from its information technology therefore he could not gain access and carry out his duties.
8. The Claimant avers that he did not receive any response thereafter and issued the Respondent a letter of formal demand dated 02.11.2018 which has never been responded to.
9. The Claimant avers that his contract of employment was unfairly terminated as the Respondent as it did not follow its own procedures on termination as stipulated in the Staff Handbook and was actuated by malice.
10. The Claimant avers that he was not accorded a fair hearing as no evidence of the allegations were availed to him and he was denied an opportunity to appear with his representative before a disciplinary committee and make representations against the allegations.
11. The Claimant avers that he served the Respondent diligently and as a result he introduced new products to the Respondent which improved the Respondent's revenue streams.

Respondent's Case

12. In opposition to the Claim, the Respondent filed its response to the Statement of Claim dated 14th February 2019.
13. The Respondent avers that upon termination, the Claimant was to remain with the Respondent during the one month's notice period but he opted to abscond work on his own volition as evidenced by the email correspondence dated 17.10.2018.
14. The Respondent avers that the Claimant was on probation from 04.09.2017 to 09.10.2018 due to his poor performance and lack of meeting set targets and this was communicated to him via letter dated 12.02.2018 and 02.08.2018.
15. The Respondent avers that the Claimant was entitled to 15 days leave days for the period worked of which he took 10 days leave and remained with a balance of 5 days.
16. The Respondent avers that the Claimant never met his set targets leading to several warnings via letters which he received and never raised any objections thereto.

Evidence in Court

Claimant

17. The Claimant (CW1) testified and adopted his witness statement dated 06.12.2018 as his evidence in chief and list of documents pages 10-62 as his exhibits.
18. CW1 testified that he was entitled to 35% commission from each of the 3 transactions he closed totalling to Kshs 1,340,500/-. He closed a deal of Kshs 350,000 for a data collection application; a deal of Kshs 480,000 from Trans Century for an internet solution and a deal worth Kshs 1,350,000 for a website and e-commerce solution and Kshs 1,650,000 for mobile applications both for Simla Seeds.
19. CW1 testified that he was dismissed after completing 6 months' probation and he wrote to the Respondent asking for confirmation and review of his salary on 12.02.2018. He then received a call from HR the same day asking he attend a performance review session whereby he was told he had not met the expected threshold and he was informed he was on a performance improvement plan.



20. CW1 testified that he worked till 06.08.2018 and was called for another review within 2 months and he then got a termination letter dated 09.10.2008, and he was required to serve until 30.10.2018 which was 18 days not 30 days.
21. CW1 testified that he was unfairly dismissed as he closed two deals worth 2.4 million within 6 months. He wrote to the HR after he received the termination letter informing the Respondent it was unfair dismissal and asking for his commission and 13 unutilised leave days.
22. During cross examination, CW1 testified that his last working day was 17.10.2018 and he was asked to return the company assets.
23. CW1 testified that he attached the Respondent's sales commission scheme policy as his evidence on how commission used to work.
24. CW1 testified that sales commission is claimed upon payment by the client, however, he did not file any documents to show the clients who paid and which commission he was claiming.
25. CW1 testified that he was put on performance improvement program vide a letter dated 12.02.2018 and there was a follow up review letter dated 02.08.2018 which referred to a meeting held on the same date.
26. CW1 testified that he was meeting his targets as agreed as evidence in page 50 of his exhibits that is emails with clients on target value. Also his colleagues congratulating him for business brought to the company
27. CW1 testified that he received a notice dated 09.10.2018 but the notice was not for 30 days, he worked till 17.10.2018. he was locked out of the organisation on 17.10.2018 as seen vide the email dated 31.10.2018 which was sent to his gmail as he was already removed from the company emails.

Claimant's Submissions

28. The Claimant submitted that Respondent failed to call any witnesses to discharge its burden, the Claimant was not afforded a disciplinary hearing as provided by the *Employment Act* or its own Staff Handbook and the termination notice was issued despite the Respondent demonstrated marked improvement in performance of his duties and he had closed a major transaction eliciting accolades from the Respondent.
29. The Claimant submitted that any allegation proposing that commissions were only payable to employees whose employment had been confirmed would be against the spirit of Article 41 of the *Constitution*.
30. The Claimant submitted that he had 13 unutilised leave days and he is entitled to Kshs 30,952/-.
31. The Claimant submitted that he is entitled to Kshs 50,000/- being unpaid salary for the month of October 2018.
32. The Claimant submitted that he has demonstrated that he dutifully and diligently served the Respondent before the unfair termination of his employment and urges this court to award him 12 months salary as damages for unlawful termination.

Respondent's Submissions

33. The Respondent submitted that the notice of termination dated 09.08.2018 was issued after the Respondent had issued performance appraisal letters dated 12.02.2018 and 02.08.2018. the Claimant



- did not produce any response to the same or any evidence of performance improvement. From the notices, the Claimant was not performing his obligations as required under the terms of engagement.
34. The Respondent submitted that the Claimant was invited to respond to the allegations and complaints set out in the performance improvement letters but failed to do so and cannot now claim that he was not heard in response to the charges against him.
 35. It is the Respondent's submission that poor performance is a valid and sustainable ground of dismissal under Section 41 of the *Employment Act*. The only condition provided by statute is an explanation be given to the employee as to the poor conduct alleged and the employee afforded time and chance to be heard, which were both satisfied by the employer and no response received. It relied on *Kennedy Amuhaya Manyonyi v African Medical And Research Foundation* [2014] eKLR.
 36. The Respondent submitted that the evidence on record, the Claimant is a perennially poor performer and despite several notices, he never improved. Accordingly, the Respondent was entitled to within the law, dismiss him from his employment.
 37. The Respondents submitted that the Claimant admitted that he did not produce any evidence that accounts which he was claiming commission has been paid. The Claimant relied on the sales commission policy which stated sales commission would be payable 'as soon as the client pays but, in any case, within 30 days of a payment.'
 38. It is the Respondent's submission that special damages must be specifically pleaded and proved, the Claimant has failed to demonstrate that he is entitled to any commission as claimed. It relied on *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR.

Analysis and Determination

39. Having considered the pleadings, exhibits, evidence adduced and submissions by the parties, the main issue for this Court's determination is whether the termination of the Claimant's employment was unfair.
40. The Claimant submitted that from the evidence adduced, the termination of his employment was substantively and procedurally unfair, illegal and contrary to the *Employment Act* and rules of natural justice and not in accordance with the Respondent's own laid down procedures on termination.
41. Justice Manani in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR held as follows in respect to termination of contracts:

“My understanding of these provisions of law is that they seek to substantially regulate termination of contracts of service particularly by an employer. First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the Act are: poor performance; physical incapacity; and gross misconduct. Section 40 of the Act provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41.

But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural structures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the



process; and finally provide the employee with a decision either terminating or saving the contract of service.

Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

42. So as to whether the Respondent had valid reason to terminate the Claimant’s employment the court will refer to section 43 of the *Employment Act*.

43. Section 43 and 45 of the *Employment Act* deals with substantive justification during termination as follows:

Section 43 states:

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

44. Section 45 of the *Act* provides in part as follows: -

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove: -
 - (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason:
Related to the employees conduct, capacity or compatibility; orBased on the operational requirements of the employer; andThat the employment was terminated in accordance with fair procedure.”

45. The Respondent submitted that the Claimant services were terminated as he was a poor performer despite several notices, he never improved. It produced in court two letters dated 12.02.2018 and 23.03.2018 which expressed the Claimant’s poor performance.

46. Against this background, the Respondent has demonstrated that the termination was not on account of malice but on valid reason based on the Claimant’s poor performance.

47. However, demonstrating the termination was based on valid reason is not enough, the Respondent has to prove that the termination was in accordance with fair procedure as provided under Section 41(1) of the *Employment Act* which provides: -

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”



- This is reiterated in the judgment in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [supra] above.
48. This court disagrees with the Respondent’s submission that a disciplinary process need not be physical by way of witness for it to be valid and lawful. The law is very clear as set out above that an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity adhere to the provisions of Section 41 (1) of the *Employment Act*.
49. The mere fact that the Claimant was sent the performance improvement letter did not accord the Claimant fair procedure before termination. Fair procedure was laid down in *Alphonse Machanga Mwachanya vs. Operation 680 Limited* [2013] eKLR, where the court observed as follows;
- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.
 - (b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
 - (c) That the employer has heard and considered any explanations by the employee or their representative.
 - (d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.”
50. Where the reason for termination of employment is poor performance the court is persuaded by the case of *Jane Wairimu Machira vs Mugo Waweru Associates* (2012) eKLR where court held:
- “The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In the Kenya Science case, the court held that 2-3 months is a reasonable period for an employee to improve. In addition, the court in the instant case also held that an appraisal of the performance of an employee must of necessity involve active participation of the employee and that a credible performance appraisal process must be evidently participatory.”
51. Having failed to adhere to the above, the termination of the Claimant’s employment was devoid of fair procedure, rendering the termination unfair and unlawful as it was in breach of Section 41 of the *Employment Act*.
52. The second issue for determination is whether the Claimant is entitled to the reliefs sought.
53. Having established the termination was unfair and unlawful, the Claimant is entitled to damages for unlawful termination. Section 49(1) of the *Employment Act* states:
- “Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for



which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

- (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

The claimant is awarded 2 months equivalent of his salary at kshs 100,000/-.

Unpaid commission in the sum of Kshs 1,340,500

54. The Claimant did not produce any evidence before this court to show that the LPOs attached were indeed paid to the Respondent.
55. Further, the Sales Commission Scheme Policy is clear that only full time employees account managers and client advisors who have been confirmed and are in good HR standing and have not resigned are eligible to policy.
56. In view of the foregoing, the Claimant is not entitled to this relief and is declined.

Unpaid leave days

57. The Respondent did not produce any records before this court to show that the Claimant took 13 leave days as alleged. Accordingly, the Claimant is entitled to this prayer and is awarded kshs 30,952/-.
58. Unpaid salary for October 2018 is also owed Kshs 50,000/-The effect of the total award of Kshs 180,952 plus interest at court rates from date of judgment till full payment.
59. Costs are also awarded to the claimant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

